UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF MISSOURI

- - - - - - - - - - - - - - - - - - - - - - -x

In the Matters of:

PATRIOT COAL CORPORATION, et al., Case No. 12-51502

Debtors.

- - - - - - - - - - - - - - - - - - - - - - -x

EASTERN ROYALTY LLC f/k/a EASTERN

ROYALTY CORP.,

Plaintiff, Case No. 12-04353

- against -

BOONE EAST DEVELOPMENT CO., et al.,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - -x

MAGNUM COAL COMPANY LLC,

Plaintiff, Case No. 12-04354

- against -

ROYALTYCO, LLC.,

Defendant.

- - - - - - - - - - - - - - - - - - - - - - -x

United States Bankruptcy Court

111 South 10th Street

4th Floor

St. Louis, Missouri

February 26, 2013

10:12 AM

B E F O R E:

HON. KATHY A. SURRATT-STATES

U.S. BANKRUPTCY JUDGE

Motion to Appoint Official Retiree Committee Pursuant to 11 U.S.C. Section 1114(d) Filed by Creditor Harold Racer (Riske, Thomas) (1919)

Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property Filed by Debtor (1995)

Motion to Allow and Amend Informal Proofs of Claim or, in the Alternative, Motion to Extend Time to File Timely Proofs of Claim Filed by Creditors Salem Electric Company, West Virginia Electric Industries, Inc., Industrial Resources, Inc., Industrial Contracting of Fairmont Inc. (2604)

Motion for Relief from Stay and Modifications of the Automatic Stay to Enforce Mechanics Liens Filed by Creditors Industrial Contracting of Fairmont, Inc., Industrial Resources, Inc., Salem Electric Company, West Virginia Electric Industries Inc. (2605) - [Order submitted]

Motion to Assume Lease or Executory Contract (Certain Transloading Agreements) by Debtor (2816) - ORDER (2903)

Motion to Approve Amended Final Order Authorizing the Debtors to (i) Enter Into and Perform Under Coal Sale Contracts in the Ordinary Course of Business and (ii) Establish Certain Procedures With Respect Thereto by Debtor (2817) + Declaration of No Objections (2891) - [Order submitted]

Motion for Authority to Implement Compensation Plans by Debtor (2819)

12-04353 ap EASTERN ROYALTY LLC F/K/A EASTERN ROYALTY CORP V
Motion for Judgment on the Pleadings Pursuant to Rule 12(c) by Plaintiff (16)

12-04354 ap Magnum Coal Company LLC VS Royaltyco, LLC
Motion to Dismiss Adversary Proceeding or in the alternative, for a more definite statement filed by Defendant (10)

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P R O C E E D I N G S

THE CLERK: Please rise. The United States Bankruptcy Court for the Eastern District of Missouri is now in session. The Honorable Kathy A. Surratt-States presiding.

THE COURT: Good morning. Please be seated.

IN UNISON: Good morning, Your Honor.

THE COURT: Good morning. All right, this is the status hearing and other matters that are set in the Patriot Coal matters. Let me first start with appearances on the record in the courtroom, please.

MR. WALSH: Good morning, Your Honor. Brian Walsh from Bryan Cave from the debtors. My colleague Lloyd Palans is here as well. And from Davis Polk & Wardwell we have Brian Resnick, Michelle McGreal, Jonathan Martin, and Benjamin Kaminetzky. And I believe Marshall Huebner, whom you met last time, Your Honor, is on the phone.

THE COURT: All right. Thank you. Good morning.

MR. WILLARD: Good morning, Your Honor. May it please the Court, Greg Willard and Angie Schisler on behalf of the official committee of unsecured creditors. On the phone is my co-counsel Adam Rogoff from the Kramer Levin firm.

THE COURT: Good morning.

MR. WILLARD: Thank you, Judge.

THE COURT: Thank you.

MR. TURNER: Good morning, Your Honor. Marshall

Turner on behalf of Citibank as agent for the first out DIP lenders. And also in the courtroom is Joe Smolinsky from Weil, Gotshal & Manges, lead counsel.

MR. SMOLINSKY: Good morning, Your Honor.

THE COURT: Good morning.

MS. LONG: Good morning, Your Honor. Leonora Long and Paul Randolph on behalf of the United States Trustee.

THE COURT: Good morning.

MR. SOSNE: Good morning, Judge. David Sosne; I'm appearing on behalf of Industrial Contracting of Fairmont, Inc. and its various affiliates. In addition, I'm also appearing on behalf of Alpha Natural Resources, Inc. and its affiliates. That's the adversary matter that's going to be argued later. And with me today are James Bromley and Emily Weiss from the Cleary Gottlieb firm.

THE COURT: All right, good morning.

MR. RISKE: Good morning, Your Honor. Tom Riske for creditor Harold Racer and those similarly situated non-union retirees. With me in the court today is Mr. Jon Cohen of Stahl Cowen in Chicago.

THE COURT: All right, good morning.

MR. COHEN: Good morning, Your Honor.

MR. HALL: Good morning, Your Honor. John Hall on behalf of Arch Coal Inc. and its various affiliates.

THE COURT: Good morning.

MR. SCHERCK: Good morning, Your Honor. Randy Scherck appearing on behalf of Bank of America as agent for the pre-petition lenders and the second out DIP lenders. With me I'd like to introduce Ana Alfonso from Willkie Farr & Gallagher. And also on the phone we have Margot Schonholtz and Penelope Jensen, also from Willkie Farr & Gallagher.

THE COURT: All right, good morning.

MS. ALFONSO: Good morning.

MR. SINGER: Hi. I'm James Singer from the St. Louis law firm of Schuchat Cook & Werner, appearing on behalf of the United Mine Workers of America.

THE COURT: Good morning.

MS. CASE: Good morning, Your Honor. Rebecca Case, local counsel on behalf of Shonk Land Company and Payne-Gallatin Company and Lawson Heirs. Mr. Christopher Smith, lead counsel for Shonk Land Company will not be on the phone today, however Tom Persinger, lead counsel for Payne-Gallatin is on the telephone today. Thank you, Your Honor.

THE COURT: All right. Thank you; good morning.

MR. GOLDSTEIN: Good morning, Your Honor. Steve Goldstein; Goldstein & Pressman, for Aurelius Capital.

THE COURT: Good morning.

MR. DOYLE: Good morning, Your Honor. Daniel Doyle on behalf of Caterpillar Financial Services Corporation and five Caterpillar Global Mining entities.

THE COURT: Good morning.

MS. MAUCERI: Good morning, Your Honor. Rachel Mauceri of Morgan Lewis & Bockius on behalf of the UMWA 1974 pension fund and the 1993 benefit fund. I'm here today with our local counsel from Dowd Bennett, James Crowe.

THE COURT: Good morning.

MR. COUSINS: Good morning, Your Honor. Steven Cousins of Armstrong Teasdale, co-counsel for Peabody Energy Corporation, together with Jones Day. Good morning.

THE COURT: Good morning.

All right, and then on the phone I believe we have Ms. Jensen on behalf of Bank of America. Ms. Jensen?

MS. JENSEN: Yes, I'm here.

THE COURT: All right, good morning. And Ms. Schonholtz as well on behalf of Bank of America?

MS. SCHONHOLTZ: Good morning, Your Honor. Margot Schonholtz. I'm here.

THE COURT: Good morning. All right, and Jason Alter on behalf of Alice Ann Wright, et al.

MR. ALTER: Yes, good morning, Your Honor.

THE COURT: Good morning. And Mr. Huebner on behalf of the debtors.

MR. HUEBNER: Good morning, Your Honor. I'm here.

THE COURT: Good morning. And Mr. Rogoff on behalf of the creditors' committee.

MR. ROGOFF: Good morning, Your Honor.

THE COURT: Good morning. And Chrisandrea Turner on behalf of Argonaut Insurance.

MS. TURNER: Yes, Your Honor, good morning.

THE COURT: Good morning. All right. And Tom Persinger on behalf of Southern Land Company.

MR. PERSINGER: Thank you, Your Honor. Good morning. And today I'm here as Ms. Case indicated, on Payne-Gallatin Company.

THE COURT: All right. Thank you.

All right, and I'll remind everybody on the phone, if you will please keep your phones on mute except when speaking, that will help us here in the courtroom as well.

All right, then, on behalf of the debtors, I believe we should probably take the docket up. Let's start with the matters on page 2 first. First is the motion to appoint the official retiree committee.

MR. WALSH: Good morning, Your Honor. Brian Walsh, again, for the debtors. Your Honor, I'd like to introduce to the Court Brian Resnick of the Davis Polk & Wardwell firm. A brief bit of background. Among other engagements, Mr. Resnick represents the joint administrators and liquidators of Lehman Brothers' affiliates in the United Kingdom, as well as the debtor-in-possession lender in the Eastman Kodak case.

I will note for the general interest of the Court, Mr.

Resnick has two degrees from the Julliard School -- probably the only person in the courtroom who can say that today, Your Honor.

THE COURT: Probably.

MR. WALSH: He has taken the lead on the matters in the main case today, and so I'll yield the podium to Mr. Resnick.

THE COURT: All right. Thank you. Mr. Resnick?

MR. RESNICK: Thank you. Good morning, Your Honor. For the record, Brian Resnick of Davis Polk & Wardwell on behalf of Patriot Coal Corporation and its ninety-eight subsidiaries who are Chapter 11 debtors in these cases. As Mr. Walsh mentioned, I'm joined here by my colleagues Ben Kaminetzky, Jonathan Martin, and Michelle McGreal, and Lloyd Palans and Brian Walsh, Patriot's local counsel from Bryan Cave.

Your Honor -- as Your Honor suggested, we should begin with the first matter on the agenda, which is the motion to appoint the retiree committee. And I'm happy to give Your Honor a little bit of background on this motion and then discuss the proposed order.

So in December of this past year, Your Honor, the debtor sent letters to approximately 600 non-union retirees, informing them that the debtors intended to seek court approval to discontinue or modify certain retiree healthcare and life

insurance benefits. The debtors actually sent the letters before year end in order to provide some advance warning to these retirees so that they can perhaps begin to make alternative plans to replace their current benefits.

Importantly, Your Honor, these are all benefits that the debtors believe they expressly reserved the right to discontinue or modify. In other words, the actual plan documentation themselves contains express language saying things like: "The company hereby reserves the right to terminate the plan, change the contributions, or modify the plan in whole or in part, at any time, for any reason, including changes in any and all of the benefits provided." That's just an example of some of the language that we find in these plan documents.

So before we actually filed the motion to terminate these benefits, on January 8th, Harold Racer, a non-union retiree who received one of these letters, and several similarly situated retirees, filed a motion to appoint an 1114 committee. Mr. Racer and those others retirees are represented by Mr. Jon Cohen of the law firm Stahl Cowen, who is here in the courtroom today.

Immediately after the motion was filed, debtors reached out to Mr. Cohen in order to try to consensually resolve their request for a committee. The debtors understand and appreciate that the discontinuance of retiree benefits is a

very serious matter and Patriot appreciates the hardship that many of the retirees experience from a loss of benefits. However, Patriot believes that the termination of the benefits will not only result in critically needed savings for Patriot, but is also consistent with the need to equitably spread the burden of the debtors' reorganization among all stakeholders. And given the sacrifices that the debtors need from their union and non-union employees and retirees, termination of these benefits, although we understand it's painful for the affected individuals, is important and we believe appropriate.

We have thus been working cooperatively with Mr. Cohen and the unsecured creditors' committee and the United States Trustee since the motion was filed, in order to ensure that the retirees get due process and are ably represented by a statutory fiduciary at the debtors' expense, during the process.

To be clear, the debtors believe that to the extent that they have the right to unilaterally terminate the benefits, that no retiree committee is required by Section 1114 of the Bankruptcy Code. However, we do understand that it is important to ensure that, in fact, the unilateral right of termination exists. In light of this, Patriot has agreed to the appointment of an official Section 1114 committee for the purpose of diligencing whether the benefits are, in fact, amendable under applicable nonbankruptcy law. Of course, if no

such right of termination existed, the debtors would have to move under Section 1114. But if, as we believe to be the case, it is determined that the debtors have the unilateral right to terminate, then we would move under Section 363 to terminate.

So to effectuate our agreement with Mr. Cohen, we've agreed to a proposed order directing the appointment of an 1114 committee with the specified scope and a specified budget. I should mention, in terms of the budget, which is 250,000 dollars, while Patriot had initially offered a lower amount, when Mr. Cohen came back to us and said that he really thought that the 250,000 dollar number was the right number to allow a committee to fully diligence the amendability issue, Patriot, and with the full support of the creditors' committee, we decided not to negotiate that number down. If that's what it takes, then Patriot is willing to fund that in order to make sure that the retirees are treated fairly and that no vested benefits are taken from them without going through the 1114 process as required by the Bankruptcy Code.

In terms of the procedure and the timing, the proposed order contemplates that the United States Trustee would appoint a retiree committee within seven business days after entry of the order. We've provided the U.S. Trustee with contact information for all the retirees yesterday, so the U.S. Trustee is prepared to begin soliciting interest for joining that committee.

The debtors will then provide counsel to the retiree committee with the plans and certain other relevant documents and the contact information for all of the covered retirees and respond to discovery requests, et cetera.

So the order contemplates that the debtors will file the 363 motion to be heard on the April 23rd omnibus hearing, at which time the debtors will ask the Court to determine whether the debtors have a unilateral right of termination under applicable nonbankruptcy law, and if so, whether they've satisfied the standards under Section 363 in order to terminate the amendable benefits.

If the Court grants the Section 363 motion, then in an effort to mitigate the hardship on the affected retirees, the debtors have agreed to provide the retirees with an unsecured claim for benefits that accrue during the entire pendency of the bankruptcy case. And this was agreed to and supported by the creditors' committee as well.

If it is determined that some or all of the benefits are actually not subject to the unilateral right of termination, then within seven days after the Court's ruling, the debtors would file a notice saying whether or not they determined to seek to terminate those benefits at that time.

In terms of the proposed order, the debtors have provided copies to the Court, the U.S. Trustee, the creditors' committee, and the DIP agents. In addition, the debtors filed

a notice of hearing on February 12th, stating that a copy of the proposed order is available on Patriot's case information website. And this notice was mailed to all the retirees that the debtors believe may be impacted by the proposed order. The debtors have not received any formal or informal objections to the proposed order. The unsecured creditors' committee has filed a statement in support of the proposed order. And the debtors have been informed that there are no objections to the proposed order by the U.S. Trustee.

We filed a slightly revised order, I believe -- sorry, we posted to the Web site a slightly revised order along with a black-line yesterday. And in the interests of time, because establishing the committee and forming the committee is actually keyed off of the date of entry of the order, we would respectfully request that the order be entered as soon as possible, if Your Honor is so inclined.

So unless Your Honor has any questions of me or Mr. Cohen, we'd respectfully request that.

THE COURT: All right. No, I have no questions at this time. Are there other parties that wish to be heard on this motion? Mr. Willard?

MR. WILLARD: Thank you, Your Honor. Greg Willard for the committee. The committee, as counsel indicated, was very much involved in this process. It is an important issue. It's an important issue to the estate and it's an important issue to

the constituents who are directly affected by the proposed action. We reached the conclusion and made the judgment that the agreement that the parties have reached appropriately limits the scope; it appropriately caps the legal fees; but more importantly, Judge, it sets a process to expedite a prompt resolution of these very complex and important issues.

On that basis, the committee supports entry of the proposed order as amended, as announced by counsel. The matter may be taken as submitted. Thank you.

THE COURT: Thank you. Ms. Long?

MS. LONG: Thank you, Your Honor. We did receive, last evening, the list. We are prepared to begin our solicitation upon the entry or the order by the Court. It may take longer than seven business days for issues that aren't within our control. There are factors that might delay the response time by those who are receiving the letter. We're going to send the letter out to a limited number of the people and start the solicitation.

So the language in the proposed order just has a little qualifying room saying we intend to do it in seven business days or as soon thereafter as we can, but just to inform Your Honor, that will be filed with the Court -- the appointment will be filed with the Court and we expect to move quite quickly with that. Thank you.

THE COURT: All right. Thank you, Ms. Long.

Mr. Cohen?

MR. COHEN: Your Honor, it's an honor to speak before this Court for the first time. Unlike Mr. Resnick, I don't have any Julliard credentials, but I can play a good six chords on the acoustical guitar. But more importantly, Your Honor, I represented Mr. Racer in this matter and similarly situated retirees. I have had the pleasure of representing approximately eight retiree committees, which in that world, is a significant number. And also, importantly, Your Honor, I've been contacted by about a hundred salaried retirees who expressed support for the efforts with respect to this motion.

The original intent of the motion, Your Honor, was to shine some light on the debtors' intent to modify or terminate these benefits and to make sure that there was due process associated with those efforts. By the agreement that has been proffered today, Your Honor, I would suggest that we've accomplished a fair result here that otherwise has saved us significant time and efforts which -- and avoided litigation over that issue.

I would note, from a legal standpoint, that the proposed order is consistent with the Farmland decision, in that we have a recognition of an 1114 committee here, in the context of a debtor that at least asserts the right to have a unilateral termination with respect to the plans at issue. And while we did hear a short preview of some of the language that

we expect the debtor to rely upon, we -- I can assure your Court that we have already received dozens of historical plan documents that I believe, in the end, are going to show a very different story and demonstrate that, in fact, these benefits would be vested.

But, Your Honor, I think that's the importance of this process is that it is a process and that there be someone sitting in the chair, so to speak, to use a common phrase these days, to make sure that what the debtor asserts can, in fact, be vetted.

Moreover, Your Honor, we've set up a bifurcated process such that in the event that we get to a point when this Court agrees that some or all of these benefits are vested or at least lifetime benefits, then the scope of the committee will automatically expand unless, under those circumstances, the debtor decides at that point that it's not going to modify or terminate during the bankruptcy process.

So I think, Your Honor, we've accomplished quite a lot, and I applaud the cooperation I've received to date with the debtors in crafting what was somewhat of a difficult agreement, and we urge that this Court accept the agreed order.

THE COURT: All right, thank you.

All right, and are there any parties on the telephone that wish to be heard on this motion?

All right. Then hearing none, I will grant the motion

and enter the proposed order that has been submitted.

MR. RESNICK: Thank you very much, Your Honor.

THE COURT: Thank you.

MR. RESNICK: Next we have -- next on the agenda we have two motions filed by a group of companies that I will call Fairmont. Happily, Your Honor, we worked with counsel to reach a consensual stipulation and order resolving both motions. The UCC and the DIP agents have signed off on the order as well. The order was submitted to chambers for entry on Friday and also posted to the debtors' case administration Web site. I will let Mr. Sosne, counsel for Fairmont, address the Court on the proposed stipulation and order.

MR. SOSNE: Good morning, Judge.

THE COURT: Good morning.

MR. SOSNE: The -- we filed two separate motions. The first one was a motion to allow and amend informal proofs of claim or in the alternative motion to extend time to file timely proofs of claim. I represent four affiliated mechanics lien claimants that apparently did work at a coal preparation plant or two different plants, of some of the various debtor entities.

We filed that motion because when the initial proofs of claims were filed by the claimants, because the account debtors and the -- were different than the entities that owned the real estate, the land upon which was improved, the claims

just didn't come out right. But the information was contained in the proofs of claims and in the various notices that were filed that suggest the correction of the claims. As a result, we filed that motion in order to correct it so that we have the appropriate alleged secured claims against the appropriate parties and the unsecured claims against the other appropriate parties.

At the same time, since the time period was running for the filing or the enforcement of the mechanics lien suits under West Virginia law, we also filed what I would call more of a comfort motion, on a motion for relief from the automatic stay, in which we wanted to make sure that there was an acknowledgment of the tolling provisions or the extension provisions, so that we didn't have to initiate -- we didn't want to be prevented from enforcing our rights. And so basically, it was a comfort motion that we filed.

We've reached a stipulation, as counsel has indicated. We submitted that stipulation to chambers on Friday. In essence, that will correct the various proofs of claims with all the parties reserving their rights to review those claims. And then we agreed to the continuation of the automatic stay with respect to the enforcement action. And so we'll deal with it on a different day.

So I think it resolves all of the pending issues that are presently before the Court. I would just be somewhat

impertinent, but I will ask that the Court enter this fairly promptly. It is time-sensitive because of the tolling periods were coming due fairly quickly. And so we would ask that the stipulation be entered promptly.

THE COURT: All right. Other parties that wish to be heard on these motions? Mr. Willard?

MR. WILLARD: Greg Willard for the committee, Your Honor. We have been involved with Mr. Sosne and debtors' counsel, and our comments have been incorporated into the order.

Our judgment is that the order that has been tendered to Your Honor is appropriately limited and narrow in scope to give exactly the relief that Mr. Sosne indicated, but nothing sort of beyond the four corners. So in our judgment it's appropriate. The matter may be taken as submitted.

THE COURT: All right, thank you. Are there other parties in the courtroom that wish to be heard on these motions?

All right, are there other parties on the telephone that wish to be heard on this motion?

All right, then hearing none, then I will grant those two motions pursuant to the stipulation that's been submitted to the Court. And we'll have those orders entered promptly.

All right, Mr. Resnick?

MR. RESNICK: Thank you, Your Honor. Next up, moving

to item number 4 on the agenda, it's the debtors' motion to approve an amended coal sale contracts order which was filed on February 12th. The debtors served copies of the proposed order on the UCC the DIP agents and the United States Trustee, and posted in on the case information Web site on February 14th.

The objection deadline for the motion passed on February 19th and no objections were filed, as evidenced by the debtors' declaration of no objection filed on February 20th. The debtors submitted the proposed order to chambers on February 20th.

Just essentially, Your Honor, there's an ordinary-course coal sale contract order that existed since the beginning -- toward the beginning of the case that the debtors have been operating under. And several potential counterparties have requested certain changes to the order. We don't view them as particularly material, but they requested these changes. So I'm happy to describe them for you or answer any questions Your Honor may have.

THE COURT: All right. No, I think that was -- that was my question: how did we get there. I do have a red-line copy of it that I have been reviewing. And it certainly seems to be noncontroversial.

MR. RESNICK: Yep. Thank you.

THE COURT: Thank you. All right. Mr. Willard?

MR. WILLARD: Your Honor, Greg Willard for the

committee. The committees' comments were included in the order. I think, as Your Honor will recall, when you were on this side of the podium, creditors very often want comfort orders in this situation. And that is precisely a significant part of what's going on here in an appropriate fashion. The committee, in its review, has concluded that in particular, the order does not confer additional substantive rights to the parties, and therefore we are satisfied with the proposed order. It may be taken as submitted.

THE COURT: All right, thank you. Are there other parties in the courtroom that wish to be heard on this motion?

All right. And are there parties on the phone that wish to be heard on this motion?

All right. Then hearing none, that motion will be granted.

MR. RESNICK: Thank you, Your Honor. Moving to the last uncontested matter on the agenda, it's the 365(d)(4) motion with respect to certain of the leases that were adjourned from the last hearing. As Your Honor is aware, the debtors filed their 365(d)(4) motion on January 15th. A hearing was held on the motion on January 29th, and an order was entered on February 13th, approving the assumption of 866 leases and the rejection of 2 leases. The 7 remaining filed objections to the motion and were adjourned.

And one of those objections has been withdrawn. This

is the objection filed by Lawson Heirs. But we're not actually going forward with the assumption of that lease today, because there are unresolved objections by certain other parties.

There were two additional counterparties, SCX and Coal River Energy, that submitted informal objections and extended the debtors' time to assume their leases to March 6th. These two informal objections have been resolved, and the debtors are seeking to assume -- approval of the assumption of the leases today. Specifically with respect to Coal River Energy, debtors have agreed to a stipulation and proposed order to resolve their informal objection which the debtors posted on the case information Web site yesterday and served on the United States Trustee, the creditors' committee, and the DIP agents.

The stipulation provides for the assumption of two subleases where Patriot is the lessor to Coal River Energy, and two subleases where Patriot is the lessee from Coal River Energy, as well as the related modification agreement and two related consent agreements. The total cure amount for these seven agreements is zero. And the stipulation provides that Patriot is not in default with respect to any of the seven agreements.

With respect to CSX, the aggregate cure amount is approximately 8,000 dollars. We've served and posted on the debtors' case information Web site, a proposed order for the assumptions going forward today, which are the various CSX

contracts. And we've also sent to the U.S. Trustee, the UCC and the DIP agents, and we've received no objections.

So unless Your Honor has any questions, the debtors request entry of the assumption order and the stipulation today. And for the remaining six objections that will not be going forward today, for those to be adjourned and heard on the next scheduled omnibus hearing on March 19th.

THE COURT: All right. Are there other parties that wish to be heard on this motion? Mr. Willard?

MR. WILLARD: No objections, Your Honor.

THE COURT: All right, thank you. All right.

MR. RESNICK: I should mention, Your Honor, that we're actually -- we are still working consensually with -- cooperatively with the other objectors, and we hope to avoid having a hearing. But --

THE COURT: All right. And are there other parties in the courtroom that wish to be heard on this motion? And are there parties on the telephone that wish to be heard on this motion?

All right. Then hearing none, I will grant the request and enter the stipulation regarding Coal River Energy, enter the order on assumption on the CSX. And then the other six objections will be continued to March 19th.

MR. RESNICK: Thank you very much, Your Honor. That concludes the uncontested portions. And unless Your Honor has

any other questions for me or would like to hear a drum solo or something, I will turn the podium over to my colleague, Jonathan Martin, to handle the Eastern Royalty LLC v. Boone East Development Corporation adversary proceeding.

THE COURT: All right. Then I have no other questions at this time. So you can proceed with that matter.

MR. WALSH: Your Honor, Brian Walsh, again, for the debtors. I'd like to introduce the Court to Jonathan Martin. He's counsel in the litigation department at Davis Polk. He has been involved in litigation in some of the more prominent cases of our recent history, including the Bernard Madoff bankruptcy and the Lehman Brothers bankruptcy. He's a former law clerk to a district judge in the Southern District of New York. And he has a Ph.D. in American history from New York University, probably the only person in the courtroom who can say that, Your Honor.

He's going to be arguing the motion in the adversary proceeding today, the motion for judgment on the pleadings.

THE COURT: All right.

MR. WALSH: And I will yield the podium to him, Your Honor.

THE COURT: All right. Thank you. Good morning, Mr. Martin.

MR. MARTIN: Good morning, Your Honor. For the record, Jonathan Martin from Davis Polk for debtor Eastern

Royalty, LLC. Your Honor, if it's acceptable to you, I'd like to hand up just a brief outline that maps out some of the points I'd like to address today. It also calls out some of the relevant provisions of the contract so we don't have to flip through them.

THE COURT: All right. Certainly that's fine. I'm going to assume oppose --

MR. MARTIN: I have some for defense counsel.

THE COURT: All right. Thank you.

MR. MARTIN: And if it would be helpful to have copies of the contracts, I have those as well.

THE COURT: Ms. Magnus (ph.), I have those already?

THE CLERK: Certainly, Judge.

THE COURT: I do have copies of the contract.

MR. MARTIN: For purposes of today's discussion, this is just to help facilitate the discussion.

THE COURT: All right, thank you.

MR. SOSNE: Your Honor, before we start, I just wanted to mention that I'm local counsel for the defendants in connection with that adversary proceeding. And a couple things. First I wanted to introduce Mr. James Bromley, who's going to be handling this matter. And while I don't know his music prowess or his background in that regard, I can tell you I certainly play a mean clarinet and spent the summer at Interlochen National Music Camp in Northern Michigan.

But before we begin, we have not seen any of these handouts, and what we would ask the Court to do is if we could take a short break so that we could take a look at these handouts before there's argument --

THE COURT: Certainly.

MR. SOSNE: -- and that way, we're not at an unfair disadvantage here.

THE COURT: All right. How much time would you like, Mr. Sosne?

MR. SOSNE: I don't know what the handouts look like.

THE COURT: It's about a quarter to 11. So you want to take a recess until about 11 o'clock and eyeball it? If that's not enough time --

MR. SOSNE: About a half an hour?

THE COURT: About a half an hour? All right. We'll be in temporary recess, then, until 11:15.

MR. SOSNE: Okay. Thank you.

THE COURT: Um-hum.

(Recess from 10:44 a.m. until 11:21 a.m.)

THE CLERK: Your Honor, we're back on the record.

THE COURT: All right, thank you. Be seated, please. Mr. Sosne, was that enough time?

MR. SOSNE: Yes, Your Honor.

THE COURT: All right.

MR. SOSNE: I think -- Mr. Bromley is going to be

taking it from here, okay?

THE COURT: All right.

MR. MARTIN: I appear to have created a ruckus, Your Honor. I'll let Mr. Bromley explain his position.

THE COURT: All right.

MR. BROMLEY: Thank you. Good morning, Your Honor. James Bromley of Cleary Gottlieb on behalf of Alpha Natural Resources and certain of its affiliates.

We'd like to object to the use of the materials that Mr. Martin has provided. As far as we can tell this is a PowerPoint presentation which constitutes a supplemental pleading filed in the case. As we calculate it right now, the plaintiffs have had sixty-six pages of briefing, if you include the nine pages that they've included in this PowerPoint. We've had simply one reply. This is litigation by ambush to have this handed to us as we're standing up to argue.

MR. MARTIN: Your Honor?

THE COURT: Mr. Martin.

MR. MARTIN: I'm happy to withdraw the handout. What's in the handout is going to be exactly what's in the transcript today. It's my argument. It was meant to help the Court. There's nothing that's in this that I'm not going to say today that you're going to be able to look at in the transcript. But if it's objectionable, I'll withdraw it.

THE COURT: All right, then it'll be withdrawn. I'll

give you your copy back, Mr. Martin.

All right, Mr. Martin. You may proceed.

MR. MARTIN: Thank you, Your Honor. Your Honor, I'd like to start with what's not in dispute here, especially given the way we started. The payment agreement standing alone is not an executory contract under Section 365. The contract is a one-way street. We pay them money; they sit back and collect it. They've completed their performance under the contract. And because performance is not due on both sides, the payment agreement is not executory for purposes of Section 365. That means it would be unlawful for ERC -- that's Eastern Royalty -- to pay it.

Now, that doesn't mean that the defendants get nothing, Your Honor. They get general unsecured claims just like everybody else. And they stand in line just like everybody else.

The problem, Your Honor, is that the defendants want to jump the line. They want to get paid a hundred cents on the dollar if they can find a way to do that. Let me explain their plan by focusing on the coal lease, the Boone lease. I'll return to the assignments at the end, Your Honor, but they are, for a number of reasons, a nonissue. And the Boone East lease is the whole ball game here, and it's decisive.

Here's their angle, Your Honor. If ERC assumes the lease as it intends to do, and if the payment agreement is held

to be a single executory contract with the lease, then ERC has to assume the payment agreement under Section 365. That means they get paid a hundred cents on the dollar. So they figure, why not make that argument? The problem for them, Your Honor, is that the argument is dead on arrival. It violates just about every basic principle of contract law. Let me explain.

For a contract to be executory in this circuit, the failure of one party to complete performance under the contract has to excuse the other party's performance under the contract. So what the defendants have to show here, Your Honor, is that if ERC stops paying the payment agreement, they can terminate the lease. That's the only way that they can use the lease to make the payment agreement executory. Now that presents, Your Honor, a plain vanilla question of contract interpretation. Does the lease require payment of the payment agreement?

The answer is no. Let's assume this was playing out outside of bankruptcy, that ERC stopped paying the payment agreement and Boone East went into court and argued that it could terminate the lease. The first thing the judge would say to them is point me to where in this lease it says that paying the payment agreement is an obligation of the lease. There'd be deafening silence in the courtroom, Your Honor. They can't point to anything.

The words "payment agreement" don't appear anywhere in this lease. Instead, there's a number of provisions that make

it impossible to argue -- not just hard to argue, but impossible to argue that the payment agreement is a requirement of the lease. Start with Sections 7 and 8 of the lease, Your Honor. Those provisions set out the rent that we have to pay them. If Boone East thought that the payment agreement was some sort of additional rent under the lease, you would expect it to appear there in Sections 7 and 8. It's not. It is not rent under the lease.

Next, Section 19 of the lease; it sets out twenty-two separate events of default. Those are the things that actually do permit Boone East to terminate the lease. They drafted twenty-two of them over five pages of the lease. They took care in drafting them. The payment agreement or failure to pay it, is not an event of default.

The finishing blow for them, though, Your Honor, is Section 23.7 of the lease. That section provides, and I quote, "The lease constitutes the sole and entire existing agreement between the parties and expresses all the obligations of and restrictions imposed upon the parties." In other words, Your Honor, Boone East said to us in writing when we entered this lease, all of your obligations under the lease, all of them, are in this lease and nowhere else. There's no other contract, no other agreement, no side letter, no e-mail that says you have any other obligations under this lease.

Section 23.7 goes on to make that point totally and

completely unambiguous. Again, reading from the section, "All prior agreements and commitments, whether oral or written, between the parties, are either superseded by specific provisions of the lease, or in the absence of such coverage, specifically withdrawn."

The point of a provision like that, Your Honor -- it's an entire agreement provision; or a merger clause; or an integration clause -- is to prevent either party from later trying to come back and add obligations to the lease. They can't come back to us, for example, Your Honor, and say you didn't send us a fruit basket on our birthday; the lease is in default. They also can't come back and say you didn't pay the payment agreement; the lease is in default. If it's not in the lease, it's not an obligation of the lease. Never ever.

That is clear, unambiguous, and undisputed on the face of the contract. And I submit, Your Honor, that for that reason alone, ERC is entitled to a judgment on the pleadings. The payment agreement is not an executory contract.

In fact, if we were outside of bankruptcy, Your Honor, the defendants wouldn't even be making the arguments. ERC stopped paying the payment agreement, they'd sue us for breach of the payment agreement. And they'd get damages. Those damages would make them whole. The problem is that in bankruptcy, the equivalent is filing a general unsecured claim and getting paid cents on the dollar. They want to avoid that.

So the defendants have the gall to come forward now in the face of this clear contract and say we want discovery on whether the payment agreement is an obligation of the lease. They might as well want discovery on whether we have to send them a fruit basket on their birthday. The words "fruit basket" don't appear in the lease. The words "payment agreement" don't appear in the lease. You wouldn't even know the payment agreement exists from reading the lease, let alone that it might be an obligation of the lease.

But they say, let's take some depositions and see what people say. But that's where they run up against the parol evidence rule, Your Honor. In most cases, discovery makes sense. Gather all the facts, get all the evidence, come back later, we'll sort it all out, figure out what the deal is. Not with contracts. Contracts are interpreted as a matter of law by the Court. We all learned the parol evidence rule in the first weeks of law school. It says you don't get discovery into the parties' intent where the contract is clear and unambiguous. Contracts are enforced according to their terms.

Discovery is permissible only when a contract is ambiguous. And that, too, is a question for the Court. It is a question of law. The mere fact that the parties advance competing interpretations of the contract does not make it ambiguous. A contract is ambiguous only if it is open to two reasonable interpretations. Basically the parties were sloppy.

They didn't do a good job of articulating their intent, because the contract is open to two plausible -- equally plausible interpretations.

In those situations, you have to go behind the contract and get discovery to figure out which one the parties intended. The classic example is a contract for the sale of chicken. Does that mean raw chicken; cooked chicken? If you can't tell from the contract, you have to get discovery and figure it out. That is not this case.

The parties were not sloppy here. The parties were not unclear about whether the payment agreement is an obligation of the lease. It's not. If it were, the lease would no longer make sense. We'd suddenly have to pay more rent than what Sections 7 and 8 say we have to pay. There would suddenly be a phantom twenty-third event of default. And Section 23.7, the entire agreement provision, would be gutted. It would have no meaning. It wouldn't be worth the paper it's written on.

The defendants cannot make the payment agreement an obligation of the lease without rewriting the lease. And that makes their interpretation of the contract unreasonable as a matter of law. There is no ambiguity.

Your Honor, I'd like to turn next to the three arguments that the defendants advance to try to support this argument that the payment agreement is an obligation of the

lease, but if the Court has any questions I'm happy to answer them.

THE COURT: No, I don't have any questions.

MR. MARTIN: Thank you, Your Honor. So the defendants have basically three arguments. Each one is a swing and a miss, three strikes.

The first argument is that they note the contracts concern the same commercial transaction. They've collected every case they can find that says when contracts are entered into contemporaneously by the same parties as part of the same transaction, they should be construed together. And they argue that it follows from that that the contracts should also be treated as a single contract. But that is not the law. The one does not follow from the other. That's true in the Second Circuit where we briefed this. It's also true in the Eighth Circuit.

I passed up a copy of In re Craig, Your Honor, which is from the Eighth Circuit. I hope that's not objectionable. I don't know how a case can be objectionable. But I'd like to read what the Eighth Circuit said about this argument decided under North Dakota law, but basically all states have the same contract law.

The court said, "The requirement that the several contracts," meaning in a common transaction, "are to be taken together, does not mean that they are to be joined and thereby

become a single contract, but plainly means that they are to be taken together for the purpose of interpreting either the transaction to which they relate or the several contracts themselves. It does not purport to destroy the separate identity of the several contracts and does not do so in effect.". That's strike one, Your Honor.

Second, they try to find language in the payment agreement that might help them. They don't even try with the lease. But they note that the payment agreement required execution of the lease and the assignments and attached them as exhibits. And they note that the payment agreement incorporated a defined term from the assignments in the lease. And they note that the payment agreement refers to "additional consideration".

The most notable thing here, Your Honor, is that they don't cite a single case that supports a view that those factors alone or together support a conclusion or even a reasonable inference that the payment agreement is an obligation of the lease. We cite a host of cases that demonstrate that those factors are not enough.

I'm not going to repeat everything that's in our papers, but I do want to address the argument concerning the phrase "additional consideration" in the payment agreement, because the law here is clear and it does not support them.

First of all, this is not a case where one contract

requires the other one for consideration. Each of these contracts, the payment agreement and the lease, is supported by independent consideration. There's an exchange of consideration in the payment agreement, a separate exchange of consideration in the lease. That's what courts look at when they're trying to determine whether two contracts are separate -- one of the factors -- whether they have separate and independent consideration. These do.

In fact, one of the biggest hurdles for the defendants here is a simple one. I am standing here with the two contracts in two different hands. The parties could have drafted one contract. It would have been easier than drafting two. They could have taken the payment obligations in the payment agreement, added them to the rent in the lease, added another event of default, been done with it. That's not what they did.

The parties showed a conscious and deliberate intent to make two separate contracts. And the cases are clear, Your Honor, that when there are multiple contracts that are part of a package of consideration in a common transaction, that does not make them a single contract.

I'd like to discuss just briefly In re Refco, Your Honor, which is cited in our papers. The facts of that case are indistinguishable from this one. Tellingly, the defendants completely ignored it in their brief. In that case, the debtor

there had purchased a business pursuant to a purchase and sale agreement. And attached to the purchase and sale agreement, the PSA, was an unexecuted agreement that the parties agreed to execute and deliver at the closing of the transaction.

The contract, which was called there "an exclusivity agreement", was additional consideration for the transaction, it was also notably not an executory contract. So in the bankruptcy, the seller argued that the exclusivity agreement was integrated with the PSA and had to be assumed along with it. It sounds familiar.

The court ruled that even though the exclusivity agreement was attached to the PSA, which required its execution, even though it was part of a package of consideration, the exclusivity agreement was not made executory by the PSA. Why? Quote from the case: "Nowhere in the exclusivity agreement does it provide that the failure to perform a material term of the PSA would constitute a material breach of the exclusivity agreement." You can plug in our contracts into that sentence. Nowhere in the lease does it provide that the failure to perform a material term of the payment agreement would constitute a material breach of the lease.

The Eighth Circuit is in accord with this, Your Honor. I also want to address quickly In re Union Financial. Those facts -- the facts of that case are also indistinguishable from

those here. There, an asset purchase agreement provided for the sale of a business in exchange for a package of consideration that included cash, an employment agreement, and the issuance of a note payable in the future. The payment agreement is essentially a note, Your Honor.

I passed up a copy of Union Financial before, too, Your Honor. And in that case the asset purchase agreement specifically referenced the note as additional consideration for the deal and attached the form copy as an exhibit. In the bankruptcy court, this court, Judge Schermer, concluded that the note was not integrated with the asset purchase agreement or the related employment agreement, because just like here, the contracts, though part of the same common transaction, had different subject matters, had independent consideration, and there was an entire agreement clause, just like Section 23.7 of the lease.

So Judge Schermer concluded that the note was not an executory contract. He was affirmed by the district court. He was affirmed by the Eighth Circuit. That's strike two, Your Honor. There is no support in the payment agreement itself for an argument, even an argument, that the payment agreement is an obligation of the lease.

Your Honor, defendant's third argument here basically concedes that point. That is, that the payment agreement and the lease don't help them. They look to a third contract, the

settlement agreement between third parties Peabody Coaltrade and Massey Coal Sales. They want to show that Coaltrade and Massey Coal Sales intended in their settlement agreement for the payment agreement to be an obligation of our lease with them. You can't make this stuff up, Your Honor.

There is no principle of law, none, under which third parties, strangers to a contract, can control its meaning. The actual parties to the contract control its meaning. That's us and them. We are not a party to the settlement agreement. They are not a party to the settlement agreement. Peabody Coaltrade and Massey Coal Sales, they are not parties to our contracts.

The intent of those third parties is irrelevant. But in addition, Your Honor, Section 15 of the settlement agreement which is the only provision of that contract that they rely on, doesn't even purport to make the payment agreement an obligation of the lease. There's no way it could.

As Your Honor knows from the papers, as part of resolving a litigation between them Peabody Coaltrade and Massey Coal Sales agreed that various of their affiliates would enter into thirteen separate contracts covering various subject matters. The thirteen agreements included the payment agreement and the lease. Section 15 of the settlement agreement is an entire agreement clause. And it says that the settlement agreement plus the thirteen agreements that are

attached as exhibits constitute the entire agreement and the "integrated memorial" of their agreement to settle their litigation; "their" being Coaltrade and Massey Coal Sales.

The point of that clause is just like Section 23.7 of the lease. It prevents Coaltrade or Massey Coal Sales from ever coming back and saying there's a phantom fourteenth agreement that was also part of our deal. It prevents them from coming back and rewriting the contract.

The provision does not purport to and couldn't make those thirteen separate contracts with different parties, different subject matters, different consideration, turning them into a single contract such that the breach of one is the breach of all thirteen. That's not what that provision does.

We cite the Rosenblum case, the Megablocks case that refute that argument. They cite nothing that supports it. That's strike three, Your Honor.

There is no reasonable argument that the payment agreement might be an obligation of the lease. They can't find one. The interpretation they propose is impossible in face of the plain and unambiguous language of the contract.

Your Honor, I'll move on now to just quickly address the assignments, and then I'll wrap up. I could go through all of the same analysis for the assignments, but I'm not going to, because for a number of reasons, they are a nonissue.

First, for all the reasons we've explained, the

payment agreement is no more an obligations of the assignments than it is of the lease. When you read the assignments, nothing remotely suggests that a thing called the payment agreement even exists, let alone make you think that it might be an obligations of the assignments.

But second, Your Honor, on top of that, even if the payment agreement were integrated with each of the assignments -- to be clear, it is not -- the resulting agreements would not be executory. That's because the assignments are not executory.

Unlike under the lease, the defendants don't owe us, ERC, any material performance under those contracts. They have substantially performed. All that remains is an indemnity. And in that indemnity, they've agreed to indemnify us for basically three things: their negligence, their breach of contract, and their failure to comply with applicable law. ERC could sue them for all three of those things in the absence of an indemnity. There's no material give there, Your Honor; no material obligation on them that remains. And the cases are clear, and we cite them in our papers, that an indemnity like that cannot make a contract executory.

Third, Your Honor, even if the payment agreement were integrated with the assignments, and even if the resulting agreements were somehow executory, ERC could just reject the assignments. That would leave them with general unsecured

claims, just the same result as if the contract were not executory. In short, no matter what, the defendants would get general unsecured claims, and that is as it should be.

So the only real issue here, Your Honor, is whether Boone East should get a shot at jumping the line, whether they should be allowed to pursue in discovery a theory that the payment agreement is an obligation of the lease. That discovery would be a complete waste of time and resources, resources that ERC, at least, could put to much better use in this bankruptcy.

The defendants have not shown that there is any ambiguity here that needs to be clarified. It is simply not reasonable to interpret the lease as requiring payment of the payment agreement. No matter how much discovery is taken, it will never be possible to read the lease in a way that makes the payment agreement an obligation of the lease.

Boone East said to us in writing, here's the rent you owe and nothing more. They said here are the twenty-two events of default that will allow us to terminate the lease and nothing more. And they said here's our promise in Section 23.7 that all of your obligations under the lease are in this lease, and we will never come back and claim that you have obligations that are not in the lease, that are in some other contract, because any such contract has either been superseded or withdrawn.

Even if they put up somebody in deposition that will say whatever they want said, it won't change anything. The contract controls as written. So I submit, Your Honor, it is clear as a matter of law that ERC is entitled to a judgment on the pleadings, that the payment agreement is not an executory contract under Section 365. The contract has zero benefit for the estate, none. It is the classic example of a contract that ERC should shed in this bankruptcy for the benefit of all of its creditors.

And I'll note that we have the support of the UCC in this motion. There is no way for the defendants to transform the payment agreement into an executory contract for their benefit alone.

Unless the Court has any questions, I'll stop there.

THE COURT: All right. No, I have no questions. Thank you.

Mr. Bromley?

MR. BROMLEY: Thank you, Your Honor. When we were doing the introductions, I found out for the first time that Mr. Martin has a Ph.D. in American history. And I actually think he's probably a magician as well. Because when you do magic, what you do is you make a noise in one direction to distract attention from what's really going on. Because of course, we know, there's no such thing as magic, it's misdirection, it's taking the thing that should be the focus of

the conversation and it's making it something completely different.

And why do I say that, Your Honor? Well, after listening to Mr. Martin's argument, I think that we're here about a motion on the Boone East lease. But we're not. What we're here for is a motion for judgment on the pleadings. And that would be the pleadings as filed by the debtors here. And they're looking for a judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, made applicable here by the Federal Rules of Bankruptcy Procedure.

And they want a declaratory judgment about the payment agreement. They don't want a declaratory judgment about the Boone East lease. So while Mr. Martin focuses over and over and over again on the Boone East lease, that's not the contract that we have to focus on.

Mr. Martin's very good with the adjectives. We have a lot of gall to make this argument. Well, I think there's a lot of gall going around, because the question that Mr. Martin repeated I think ten or fifteen times as the crucial question here is stated as such: whether payments under the payment agreement or performance under the payment agreement, is an obligation of the lease. Again, it's all about the Boone East lease.

And I'll get to why I think that's the most important focus of the debtors, it's because it's the only one that's

actually operating at the moment in terms of the pieces of property that are at issue here. But, Your Honor, if I may, I think it would be worthwhile to actually look at the payment agreement. And I'm not sure if Your Honor has a copy of the payment agreement?

THE COURT: I do.

MR. BROMLEY: If I could ask Your Honor to just open up to it?

THE COURT: I have it.

MR. BROMLEY: And Your Honor, just if I could ask a question; is the one that you have in front of you the one that has, in handwriting, August 31 at the top of the document?

THE COURT: It is.

MR. BROMLEY: Okay, great. So that is the document that the plaintiffs attached to their complaint. It is the document that we admit is the payment agreement at issue. And so the question that we're trying to address here and that we've raised in our answer and our affirmative defenses, is that at this stage, this very preliminary stage of these proceedings, this adversary proceeding, is the payment agreement, the one that they're trying to get a declaratory judgment as nonexecutory, is that agreement ambiguous at all, such that it's worthwhile to undertake discovery?

Now, I'm not going to stand here, like Mr. Martin, and state so unequivocally that there's no argument that he could

ever have, there's no position he could ever take. That's not my job. I'm not going to be dismissive of legal argument and state it in absolutes, even though he's done it with our arguments. But it's worthwhile to focus first on the agreement.

So Your Honor, if I could ask you, note that the date on the top of the agreement is August 31. That's also the date of the Boone's lease. It's also the date of each of the four partial assignments. And I say partial, because that's important. The terminology that we use when we're discussing these things colors the argument, because if we start saying it's an assignment, well, then it's just an assignment. But it's not just an assignment; it's a partial assignment. What does that mean? It has meaning. It means that we did not assign everything; we've kept some things and we've assigned some things. That goes directly into the teeth of Mr. Martin's argument relating to whether or not the assignments, when integrated into the payment agreement, are executory.

The assignments and the payment agreement, when integrated together, as they must, are totally executory, with substantial obligations owing on both sides, and not just obligations relating to indemnities. Even if it was just indemnities, Mr. Martin would lose, but there's a lot more than that.

So if I could ask Your Honor to turn, on the payment

agreement, to page 3.

THE COURT: All right.

MR. BROMLEY: And at the top of that it says "witnesses" in capital letters. This is a very critical sentence, Your Honor, because this is where that term "additional consideration" appears. That term "additional consideration", that Mr. Martin dispenses with, with such derision, what it says is: "Now, therefore, as additional consideration for the coal reserves to be assigned" -- it should have an E-D -- "assigned and leased to ERC by the Massey entities", and then, Your Honor, look at the next words, "pursuant to this agreement, the parties agree as follows".

The payment agreement -- the payment agreement, this five-page document, which is completely irrelevant, this five-page document, which doesn't warrant a moment's discovery, this five-page document is the document that the parties have signed which says that it's pursuant to this document that the coal reserves are leased and pursuant to this document that the coal reserves were assigned. It's not just a phrase "additional consideration" that's flowing out there in the ether.

This isn't some employment agreement that was part of a large group of other agreements, and this has nothing to do with the Refco case. This payment agreement says it is the operative document. This payment agreement says it's this

agreement that assigns the coal reserves and it's this agreement that leases the coal reserves.

You can't ignore that, because the question that we've raised in our defense is whether or not this payment agreement should be integrated with and read as a single document with the assignments in the Boone East lease. And the answer has to be yes, because you have two documents in front of you today, Your Honor, that say that they leased the coal reserves: the Boone East lease and the payment agreement. Both of them are signed by the same people. Both of them are signed on the same day. Which one's right?

We're not allowed to have a single bit of discovery. We're not allowed to have a single document. We're not allowed to ask a single question. We're not even allowed to ask a single question of the lawyers who drafted this, who were ERC's lawyers. We're not allowed to ask those lawyers. And mind you, there's not a single word in any of these agreements that say that, notwithstanding one party's lawyers drafting these documents, they shouldn't be read against the draft. That's law across the country.

Every one of these documents drafted by ERC's lawyers, and two of them say that it's that agreement that leases the coal reserves. Which one's right? It is so crystal clear in Mr. Martin's mind that we don't have to go any further. It's so crystal clear that you, Your Honor, should sit here today

and say that, notwithstanding the fact that these debtors have said that this will cost my client eighty million dollars, we should finish it today -- today; just write it off, notwithstanding the fact that there are two documents, signed by the same parties, that say the exact same thing.

We're not allowed to have any discovery. And you, Your Honor, are not allowed to have any evidence to determine whether or not these things can be read together, what these parties meant. I think that's wrong and I don't think it's the law.

When you get past that sentence, Your Honor, it says, "Number one, partial assignments". Again, "partial assignments" -- not the term that Mr. Martin uses over and over and over again, "assignments" -- "partial assignments". And it would be worthwhile, Your Honor, to take a look at a partial assignment, because we talk a lot about these partial assignments. Mr. Martin says they're irrelevant and they're not executory. Well, Your Honor, they're interesting, at least.

If I could ask Your Honor to take a look -- and this is -- I'm assuming you have the exhibits to the complaint?

THE COURT: I do.

MR. BROMLEY: And I'm sorry, they weren't numbered -- the pages were not numbered separately. This is Exhibit 5. That's Exhibit 5 to the settlement agreement. It is about

one-third of the way through the deck, and it comes right after several maps.

THE COURT: Yes, Exhibit 5 to the settlement agreement?

MR. BROMLEY: Yeah, it says --

THE COURT: I have it.

MR. BROMLEY: -- "Exhibit 5, Partial assignment" --

THE COURT: Um-hum.

MR. BROMLEY: -- "and assumption agreement".

THE COURT: Yes.

MR. BROMLEY: Exhibit 5, "Partial assumption and assignment agreement", is referred to in the payment agreement under 1(a). It says, "New River and ERC will execute the partial assignment and assumption agreement attached as Exhibit A." Berwind River partial assignment, that's what this is.

So what does it say? Well, it says a few things. It does indeed have an indemnity, and I'll get to that last. But in the third "whereas" clause, the third recital, it says "subject to the terms and conditions of this partial assignment, assignor" -- that's my client -- "desires to sell and assign to assignee", Mr. Martin's client. And it talks about the ability to mine the assigned reserves. That's a term that's taken and used in the payment agreement, "assigned reserves". It's defined in every one of the assignment -- partial assignment agreements.

But then it says, "together with the nonexclusive right to use the surface overlying the assigned reserves" -- "together with the nonexclusive right to use the surface overlying the assigned reserves". I think one of the things that we have to recognize, Your Honor, is that we're talking about a coal mining company. This is not -- these mines, these properties are not strip mines, they're not surface mines; these are underground mines.

And so when you're talking about the world of coal, you're talking about what's on the top of the ground, straight down, as if the wall has gone all the way to the center of the earth. The fact that this partial assignment gave the right to mine certain coal in that silo, that goes all the way to the heavens and all the way to the center of the earth, doesn't mean that my client doesn't continue to have the right to work on the surface.

Just imagine a big hole in the ground and there's something on top of it. Well, why is that important? Can you imagine a more integrated relationship? This is as if I'm leasing out the basement of my house and I'm still living on the first floor. When we're talking about indemnity and continued performance, the idea that Mr. Martin's client is in the basement of my house, digging out coal, and I am living on the first floor playing Wiffle ball with my children, planting rose bushes, mowing the lawn, that is a long-term, integrated

relationship, because there are things that Mr. Martin can do underneath my property that can ruin my right to use the property on top, and there are things on the top that I could do to ruin Mr. Martin's right to mine underneath. And oddly enough, I'm not just living upstairs with my family; I'm also a coal mining company.

All of these properties are located right next to each other in Boone County, West Virginia. It's not as if these are all put out in self-storage facilities off the highway, and you have a little key to it and you drive up and you open the door and you walk in and there's your coal. There are gigantic trucks, the one you see on mega movers, that are moving things from one point to another: their coal over our property, our coal over their property. They are using our water and our electricity. We're using some of their water and their electricity. We're both coal mining companies and we are, together, exploiting that land.

The idea that this document, which is a partial assignment -- they don't get all the rights to it -- is not executory, that there's no ongoing rights between the guy mining in the basement and the guy upstairs driving his gigantic trucks over it -- we talk about gall; this is outrageous, completely ignoring the facts and circumstances of what we're talking about here.

These properties are right next to each other; they're

all within a stone's throw of each other. And there's an explanation why some were taken and given from them to us and why some from us were given to them, because you know, if there's a seam of coal on the other side of that wall, and I'm mining right here, and I don't have the right to mine it, I can't go. But you know what? If the other guy's over there and he owns the rights to that coal, but I'm in this room in the middle, he can't get to it. So he might own it, but he can't get to it. This was a rearrangement of coal reserves to allow those closest to them to exploit them, so that the guy in that room is now in this room, and he can break through that wall and take that coal. This was an entirely integrated relationship. And every one of these assignment agreements, partial assignment agreements says exactly the same thing.

But this Berwind one says something different. It says -- and this is page 4, Your Honor, in the middle: "Additionally, ERC" -- Mr. Martin's client -- "further agrees to pay New River" -- my client -- "for each ton of coal mined and sold, from only those assigned reserves specified in and subject to the Berwind-New River partial assignment, one and a half percent of the gross sales price per ton."

In this partial assignment for this coal reserve, anything they take out, we get an additional payment. And why is it important? Well, if you go to the paragraph above it -- it's a little -- the copy is a little dirty, at least the one

that I have. But what you have is in the paragraph that begins on page 3, and the title of that paragraph is "Tonnage payments". And in the papers filed by the plaintiffs, they refer to these as override payments, and we agree that in the business, the coal business, these tonnage payments are known as override payments.

You will see that when we're talking about payments, under payment agreement, that these are the payments we're talking about. And there's A, B, C, D, and E. They correspond with paragraph 1, A, B, C, D, and E. A, B, C, and D are all assignments, partial assignments; you see, I'm even falling into Mr. Martin's trap. E relates to the Boone East lease.

So while Mr. Martin went on and on and on about there not being any reference in the Boone East lease to rent, additional rent under that document, this document, in E, refers to override payments relating to the leased coal; leased is a capitalized term. It says "as defined in the Boone East van lease"; that's the Boone East lease that we're talking about.

This payment agreement -- this payment agreement says that there are additional payments that have to be made under this agreement for coal mined out of the properties subject to the Boone East lease. In addition to the rent that is paid under the Boone East lease itself, they have to pay more under the payment agreement. Of course you have to look at these two

documents as integrated. Why would the payment agreement have a requirement that his client is going to have to pay my client more than what the lease says?

Well, let's hop over to Mr. Martin's Boone East lease. And he talked a lot about paragraph 23.7, and that's the integration clause or the merger clause. We had a little argument in the papers about whether it's merger or integration. Frankly, it made my head hurt.

But the language in 23.7 is very interesting. It talks about prior agreements, prior documents, prior representations. And it says, "All prior agreements and commitments, whether oral or written, between the parties, are either superseded by specific sections of this lease, or in the absence of such coverage, specifically withdrawn."

It's impossible, Mr. Martin says, impossible to read this clause as doing anything else but allowing the Boone East lease to stand alone and unrelated, completely, to payment, because it says all prior agreements and commitments are superseded or withdrawn. But there's a word that Mr. Martin hasn't focused on; it says "all prior agreements" -- prior -- prior, before, all agreements before this one.

So if you flip over to the next page and you actually look at the signature page, it's interesting. The Boone East lease doesn't itself have a date on the signature page, on page 52, but on page 53, there are two notary publics who say that

"The foregoing instrument was acknowledged before me this 31st day of August, 2005."

I would then ask Your Honor to go back and look at the date on the payment agreement, which is August 31st, 2005. The payment agreement is not a prior agreement; it's a contemporaneous agreement, same time, simultaneously. The Boone East lease integration clause says nothing about contemporaneous documents. This document is not a prior document. This document is not overruled and it's not excluded by the Boone East lease. Contemporaneous, not prior.

And if we're going to read the documents strictly, then we have to give due credit to the words that are being used. And remember, these documents were written by Mr. Martin's lawyers. So the idea that the Boone East lease, somehow, with this integration clause or merger clause or whatever we want to say, absolutely cuts the legs out from the payment agreement is just wrong. The two documents, read together, make it clear.

So what does that leave us with? Well, let's go back to the payment agreement. There's an obligation in the payment agreement to pay extra money for any coal mined under the Boone East lease. There's an obligation in the payment agreement to pay money for everything mined under the four partial assignments. There's no integration clause in the payment agreement. There's no integration clause that governs the

payment agreement in the Boone East lease. There's no integration clause in any of the assignments. In the absence of an integration clause, the question of whether or not the parties intended that the agreements be read together, to be integrated, is a question of the parties' intent. We don't have a dispute about that.

And the question boils down to: should we be able to make that decision on the four corners of the document? Well, the document is the payment agreement. That's the relief that they're seeking. They're not seeking a declaratory judgment that these other documents do not reference the payment agreement. They're seeking a declaratory judgment that this payment agreement is not integrated with any other document. They're saying it's nonexecutory. They're saying it has the ability to be rejected right now if it was executory. And anything in here that says that they have to pay anything, completely wiped out. They've said my client will lose eighty million dollars. Yeah, we'll have a proof of claim, under Mr. Martin's scenario. That's not what we're entitled to. We've got six documents here; they're all tightly tied together.

And this is when we come down to where we are in terms of the standards, the question of whether or not this is the appropriate time to cut everything out and simply focus on the four corners of this agreement, notwithstanding the fact that it states very clearly that this is the agreement that assigns

the coal reserves and that this is the agreement that leases the coal reserves, notwithstanding that -- notwithstanding the fact that it cites all four of the partial assignments plus the Boone East lease, what we're supposed to do is walk away, based on the four corners of this agreement.

So what are the pleading standards? Well, you know what I find very odd about this argument is that I am the defendant in this case. And when you sit down and you read all the case law, Iqbal and Twombly, it's all about whether the plaintiff has said enough, whether the plaintiff has made a pleading that's sufficient, whether the plaintiff's pleading is plausible, not probable, but plausible. Why is that? Because it's extraordinarily rare for a plaintiff to file an adversary proceeding, file a complaint, and then, without giving the defendant any ability to conduct any discovery, and notwithstanding the arguments about that agreement that are the subject of the litigation, say that they're entitled to judgment on the pleadings.

The burden here on plaintiffs is enormous. And Your Honor, I would argue, and I do argue, that the payment agreement, on its face, makes it absolutely clear that they cannot satisfy that high burden. Even if this was about the Boone East lease, and it's not, there are two documents that say that the reserves at issue are leased under that agreement, the payment agreement and the Boone East lease.

I'd like to focus a little bit on the partial assignment agreements again, because Mr. Martin said a lot about executory, and I talked a little bit about the guy in the basement and all that. But there's another provision that is in these partial assignment agreements that he hasn't mentioned, and that there's a very lengthy provision relating to arbitration. That's paragraph 6 -- or section 6, and it's in each one of the partial assignments.

According to Mr. Martin's formulation of the world, the assignment agreements are completely performed; there's nothing left -- no material obligation owing in either direction by either party. If that's the case, why would you take the time, when you don't have an integration clause, and you don't have a lot of the standard boiler plate that you have in a corporate agreement, go to the bother of having a three-paragraph arbitration provision? If both parties have fully performed, why in the world would that matter? Well, because there are continuing inter-related operations that are going on. "Any dispute, claim or need for interpretation arising or relating to this partial assignment, or the breach thereof, including but not limited to a claim based on or arising out of an alleged tort."

We all know that you can't sue, in contract, for tort claims. The mere fact that they mention tort means that there's an ongoing relationship sufficient enough that the

parties are going to potentially run into each other and commit torts, one way or the other, against each other. And that's, of course, totally logical, when you've got two coal mining companies operating at the same physical location trying to mine coal.

Mr. Martin also talks about the indemnity, and he says, well, it just states the obvious. This is a coal mining business. I mean, we have a coal mining business and they have a coal mining business. Both our companies do the absolute best to try to operate these coal mines in safe and appropriate fashions. But anyone who's paid any attention to the coal mining business knows that things happen. People get injured. Coal mines collapse. Facilities that retain water that are used to clean things that are full of toxins, sometimes dams give way. People go to jail. People are criminally prosecuted relating to coal mining problems.

The idea that in all the cases -- and there are a number of them that say just having indemnity is sufficient to say it's an executory agreement, but to try to sit here and say that an indemnity that's going back and forth, because it's a two-way indemnity between two coal mining companies that are actually mining coal together on the same physical location, somehow is not material, just doesn't make any sense.

So when we come back to this arrangement, it's important, maybe, for me to summarize, at least for my own

edification, how we ended up here. In July of last year, when the Patriot debtors filed for Chapter 11, they filed a motion for determination of this issue on the first day of the case. The first day, you're filing your petitions, you're filing your motions to make employee payments, you're filing all of the standard first-day motions to keep the business running. They took their time to file a motion to try to break up this integrated document, because they didn't want to pay it. They didn't want to suffer any potential downside. They wanted that decided immediately. They filed a motion not only that said that they want this issue determined, but they wanted it determined retroactively to the petition date, so that if there's an executory contract and they get to reject it, we don't have any post-filing damages because we're now nine months into the case; they all relate back to the petition date.

We talked to Judge Chapman in a chambers conference, and it was decided that we were not going to proceed on a motion, and the debtors decided to go forward on the basis of an adversary proceeding. In connection with those discussions, we offered to litigate this, with complete and total discovery, to a trial on the merits by December of last year. That offer was refused.

We're not talking about wasting enormous amounts of money. That's a bugaboo that people throw out there when they

have something to hide. We have the right to discovery. We've been sued. These agreements are ambiguous, at best, on their face. But to the extent that they're clear, they're clear in our favor. And notwithstanding the hostility of the comments that have been made by debtors' counsel, we have been entirely willing to litigate this in a very efficient and prompt manner, because it would be helpful for this Court, before it makes a decision on such a material issue, if it has all of the facts in front of him, because Your Honor, this is really a facts and circumstances analysis.

The four corners of these agreements -- and there's only one that they've actually put in front of you that the four corners count -- aren't enough. To talk about the payment agreement, the debtors themselves, by attaching an inch and a half worth of material, indicate that the payment agreement relates to a lot more than simply the four corners of that document. The language itself, of the payment agreement and the Boone East lease and the partial assignments, all make clear that they relate to each other.

And the mantra of saying that there's nothing in the lease that says that the payment agreement is integrated into the lease is the wrong analysis. It's like going west when you're supposed to be going east. This is a litigation about the payment agreement. That choice was made by debtors' counsel. And the question is: is this document integrated with

any other one? It's clearly integrated with each of the partial assignments in the Boone East lease.

At this first hearing, nine months after the motion was filed, we submit, Your Honor, that it is entirely inappropriate that there be a judgment on the pleadings. We will give Your Honor the assurance that if this goes to discovery, which we believe it should, we will be efficient and we will be prompt, and indeed, we've already collected everything we need to collect.

We think we're talking about single-digit depositions, maybe a Bankers Box, at most, full of documents. And we'd be able to have a full trial on the merits before Your Honor, according to a schedule that you'd like to set.

Unless you have any further questions, Your Honor, I'll sit down. And if Mr. Martin has anything further to say, I may stand up again.

THE COURT: All right. Thank you.

MR. BROMLEY: Thank you very much.

THE COURT: I have no questions at this time.

MR. MARTIN: Just briefly, if it's --

THE COURT: Mr. Martin, briefly?

MR. MARTIN: -- acceptable to the Court.

Your Honor, I'd note at the outset that Mr. Bromley did not dispute that the payment agreement, standing on its own, is not an executory contract. We can start where I did,

where Mr. Bromley says we have to start, with the payment agreement. When you look at it, it is not executory. We pay them money; they do nothing in return.

The next question, the question that brings us here today, is whether they have made a plausible argument that some other contract, a separate contract, makes it executory. That's the reason for looking at the lease and for looking at the assignments. And on that question, Your Honor, there is no ambiguity, because the question here is whether the payment agreement is made executory by those other contracts, which means they have to be able to show that if we stop performing on the payment agreement then there's something they can stop doing for us, under either the lease or the assignments. Mr. Bromley went through a long discussion about how tightly knit these contracts are, and we've got a deep history, and we're mining companies, and it's complicated, but he can't point to anything that they can stop doing, under the terms of those contracts, if we stop paying the payment agreement. That means, as a matter of law, the payment agreement is not executory.

Now, he says, well, maybe we'll find out that really the parties intended for the payment agreement to be the lease or the assignment. The contracts are clear, Your Honor. This is another articulation of the it's-all-one-common-transaction argument. The cases we cite in the papers, In re Craig, all of

them are clear. The mere fact that contracts are entered into contemporaneously as part of the same transaction is not enough to make them a single contract so that the breach of one is automatically the breach of another. And that's the only way they can make the lease or the assignments turn the nonexecutory payment agreement into an executory contract.

On the assignments, Your Honor, Mr. Bromley didn't identify anything, any performance that they can stop doing if we stop paying the payment agreement. All that remains is the indemnity.

Now, he brings up an arbitration clause. But you also noticed, throughout that entire recitation, there wasn't a single citation to any case that supports that, on the arbitration clause or anything else. There is no reasonable argument that, even based on all the factors they have identified, that any of them supports even a plausible argument that the payment agreement is made executory by the assignments or the lease.

Mr. Bromley said the Section 23.7 is not really game-over for them, because the payment agreement was entered into on the same day, so it's not a prior agreement. Well, Mr. Bromley leaves off the first sentence of 23.7, which says, "This lease constitutes the sole and entire existing agreement between the parties, and expresses all the obligations of and restrictions upon the parties." A lease sets forth all

obligations of the lease. He also fails to note that the payment agreement was structured in a very careful way. And it says upon execution of this agreement, then Boone East and ERC will execute the Boone lease. One happens first, then the next one.

The parties knew what they were doing. If they didn't mean what they said in 23.7, somebody would have said so. But the payment agreement came first, then the lease. And the lease is unmistakably clear, not just in Section 23.7, but in other provisions of the lease, that there is no obligation under the lease to pay the payment agreement. It is not rent under the lease.

And just to clear up a misconception, I think Mr. Bromley misspoke when he said that I had argued that the assignments were fully executed on both sides. That's obviously not the criterion here, Your Honor. A contract is executory only if there is performance on both sides. Our performance, what remains of it, doesn't make a difference here. The question is whether there is performance on the other side of these contracts. And for the assignments, there is none that is material, and that's what matters for Section 365.

So for the assignments, there is an additional argument that any contract here is not executory. For all the reasons we said in our papers and I said today, there is no way

to read the assignments or the lease as requiring payment of the payment agreement. And that means that the payment agreement is not an executory contract.

Unless the Court has any questions, I will sit.

THE COURT: All right. Thank you.

Mr. Bromley, do you have anything else, briefly?

MR. BROMLEY: Just to say I disagree with everything Mr. Martin said. But with that, I'll sit down, Your Honor.

THE COURT: Thank you.

All right, then, if there is nothing else on this matter, I will take that motion under submission and I'll enter a written order on the matter. And then I believe that concludes everything.

There's one other matter, the Magnum Coal v. Royaltyco, LLC, but I believe that matter has been continued?

MR. MARTIN: That's correct, Your Honor.

THE COURT: All right. All right, then I believe that concludes everything on the printed docket this afternoon.

Are there any other requests, then, on behalf of the debtor this afternoon?

MR. RESNICK: No, there are not, Your Honor.

THE COURT: All right. Thank you.

MR. RESNICK: Thank you.

THE COURT: Are there any other requests by any of the other parties in the courtroom?

All right. Are there any other requests by any of the parties on the telephone?

All right. Then hearing none, I have a couple of announcements I'll make. I would like to, again, acknowledge now that over 620 letters have been received, read by me, and placed on the record as correspondence. As such letters continue to arrive, I will continue to read them and place them on the record. I thank all of those who have taken the time to address the Court and share their thoughts.

I believe we have our future court dates, which would be March 19th, April the 23rd, and May the 21st, all at 10 a.m.

And then I'd also like to state for the record that there was a telephonic hearing that was held in this case on Tuesday, February the 19th, 2013, regarding an emergency request for additional time to respond to the debtors' motion for authority to implement a compensation plan. The invited parties were: counsel for the debtors, the United Mine Workers Association Funds, the United Mine Workers Association, the creditors' committee, and the U.S. Trustee's Office. I failed to include Citibank, but they participated, nonetheless. I also failed to include Bank of America, and I apologize for that. Going forward, I will ensure that counsel for the creditors' committee, Citibank, and Bank of America are all invited to such telephonic hearings.

And finally, I'll remind people about appearances in

court. All parties that have entered their appearance in this case are welcome to appear in person in court, or to request to appear by telephone at all court hearings. If you are requesting to appear by telephone, please do so no later than three business days before the hearing, to my courtroom deputy, John Howley. If you don't call three days ahead of time, you don't get to get on the phone, as some people found out this morning.

All right. I have nothing else.

Is it my understanding, Mr. Scherk and Mr. Turner, you and your clients have a matter you would like to address with the Court?

MR. TURNER: Good afternoon, Your Honor. We have been asked by certain members of the lending syndicate if it would be possible for them to appear telephonically in a listen-only mode. Recently the debtor has filed its most recent 10-K. Some of the members of the syndicate have become increasingly focused on the case. And given that they are the likely sources of funding -- potential further funding in a case and/or upon exit, they have requested whether or not the Court would be amenable to that listen-only request, Your Honor.

MR. SCHERCK: Your Honor, on behalf of Bank of America, first of all, thank you for your latest announcement. My client very much appreciates that, as far as telephonic hearings. We would mirror the comments -- and I would also

add, we have a situation where Bank of America is an agent for several other entities, and we are also a very, very large creditor, and the funding for this case, the co-funding, I will say, for this case, essentially, in a lot of ways, it is very, very important to our client.

We would have one individual who would like to listen only by phone, and this particular individual is the agent, and he then has significant reporting requirements to other entities that are part of this syndicate group. So for that reason, I think at the end of the day we would save quite a bit of time and money by allowing, if the Court would so permit, this particular individual, as agent, to be able to hear what transpires. He then will be able to report to the other members of the investment syndicate group. And for that reason we would like, again, to listen only. We would like this one representative, who we requested to listen only, to be permitted.

I know the Court has expressed a desire, previously, not for that to occur, and we understand that and appreciate that. But we're making this request, so we hope the Court will reconsider its position and allow our one representative to listen only telephonically. He happens to be located in Texas, so travelling here would be very inconvenient, and we don't want to necessarily have to go through that expense. But if he could be permitted to listen only as the agent for this group,

we would very much appreciate that.

THE COURT: All right. Thank you.

Are there other parties in the courtroom that wish to be heard on this request?

MR. HUEBNER: Your Honor --

THE COURT: Hold on. Let me start within the courtroom, and then I'll get to the parties on the phone.

Mr. Resnick?

MR. RESNICK: That was Mr. Huebner.

THE COURT: Oh, all right.

MR. RESNICK: I'm not sure if it was, though.

THE COURT: I'm not sure who it was, but --

MR. HUEBNER: Well --

THE COURT: I'm --

MR. HUEBNER: -- it is Mr. Huebner, in fact.

THE COURT: Yes?

MR. HUEBNER: Good afternoon, Your Honor. Obviously, what the Court decides to do with the telephonic appearance request is obviously the Court's decision. I would note, though, Your Honor, that we do try to save the estate's money and professional fees wherever we can, which is essentially why I am not in attendance before you, which I hope you will forgive me.

We do pay the fees and expenses of the DIP lenders, and frankly, if the alternative is to have a representative

from each of Citibank and BofA travel into St. Louis for every hearing at the expense of the estate, as opposed to being able to dial in and simply listen, so that they can in fact report back to our very valuable DIP lender constituencies, the debtor certainly would have no objection, Your Honor, to representatives from both Citi, the senior DIP agent, and Bank of America, the second out DIP agent, being able to simply listen in quietly, as they have suggested, so we can ultimately -- you know, they certainly have a legitimate need to understand and watch what's going on, and I think that we would prefer that it be done as most cost-effectively as possible, subject, obviously, in all events, to whatever the Court's pleasure is on the topic.

THE COURT: All right. Thank you.

All right. Mr. Willard?

MR. WILLARD: Judge, briefly. Greg Willard for the committee. I would echo Mr. Huebner's comments. At the end of the day, all of these expenses, at some point, are going to come out of our constituency's pocket. And I think, under the circumstances, given the narrow scope of the request, and the real benefits that I think it would derive for the various parties, we would support the request, Your Honor.

THE COURT: All right. Mr. Goldstein?

MR. GOLDSTEIN: Your Honor, I wasn't prepared to speak on any issue today. However, let me inform the Court that I

represent a significant holder of the debtors' bond debt. We have asked for a place on the committee. As of yet, that matter has been taken under submission. I've been asked to report on developments. My client pointed out that these bonds are trading in the public markets, and if someone who is not an attorney can have access to real time information, my client, I'm sure, would insist to ask me to.

THE COURT: Thank you, Mr. Goldstein. I think you point out part of my dilemma.

Mr. Scherck?

MR. SCHERCK: Thank you, Your Honor. One other comment. I made an inaccurate statement. It is possible, although not likely, that other members of the Bank of America group may want to listen in, and I want to be candid with the Court about that. Although it's not a likelihood, but it certainly is a possibility that other investors in this investor syndicate group may want to listen in at some point. And obviously, we would go through the process and provide the names to Mr. Howley, if there would be more than one person. So I wanted to clarify that. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Turner?

MR. TURNER: And Your Honor, that's certainly the case with regards to Citibank. We've gotten specific requests from members of the syndicate to, if possible, participate. Thank

you.

THE COURT: All right. Gentlemen, I'll take the requests under submission. I want to think about this some more, and think about -- of course, that is the main issue that comes up for me is how do I stop with just your clients? How do I stop with -- I have requests from the media, can I just participate by phone, which is probably never going to happen, but those requests come about. So I will contemplate the request and I'll have Mr. Howley get back with everyone on that.

MR. SCHERCK: On behalf of Bank of America and its group, thank you very much, Your Honor, for taking this up today.

THE COURT: All right. Thank you. No problem. All right, then, are there any other requests, then, this afternoon by any parties present in the courtroom?

All right. Then hearing none, are there any other requests by any of the parties appearing on the telephone?

All right. Then hearing none, we'll be in recess.

Thank you.

MR. RESNICK: Thank you, Your Honor.

THE COURT: Thank you.

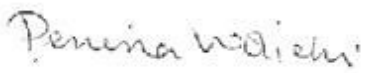
(Whereupon these proceedings were concluded at 12:49 PM)

# I N D E X

## RULINGS

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.



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Date: February 27, 2013

## B

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**UNITED STATES BANKRUPTCY COURT**
**Eastern District of Missouri**
**Thomas F. Eagleton U.S. Courthouse**
**111 South Tenth Street, Fourth Floor**
**St. Louis, MO 63102**

**In re: Debtor(s):**
Patriot Coal Corporation

**Case No.: 12−51502 −A659**

**CHAPTER 11**

**Notice of Filing of Transcript and of Deadlines Related to Restriction and Redaction**

To: All Persons of Record at Hearing

A transcript of the proceeding held on February 26, 2013 was filed on February 27, 2013.

The following deadlines apply:

If you wish to have personal data identifiers redacted from the transcript, a *Request for Transcript Redaction* must be filed within 7 days of the date of this notice: March 6, 2013. Personal data identifiers include: **social security numbers, financial account numbers, names of minor children, and dates of birth**. If no such request is filed within the allotted time, the Court will presume redaction of personal data identifiers is not necessary.

Any party seeking redaction shall file a *Statement of Transcript Redactions* identifying the location of the personal data identifiers sought to be redacted within 21 days of the date of this notice:March 20, 2013. The party filing the statement shall serve it by regular mail upon all parties at the hearing and shall include a Certificate of Service listing the date and parties served. The *Statement of Transcript Redactions* event will be restricted from public view and cannot be served electronically through the CM/ECF system. If no Statement of Transcript Redactions is filed within the allotted time, the Court will presume redaction of personal identifiers is not necessary.

Any party may file a response in opposition to the Statement within 7 days of the date the Statement is filed using the *Response to Statement of Transcript Redactions* event. If a response in opposition to the Statement is filed, the Court will rule on the matter. If a hearing is needed, the Court will send notice of hearing.

If a request for redaction is filed, the redacted transcript is due within 31 days of the date of this notice: April 1, 2013.

The transcript may be made available for remote electronic access upon expiration of the restriction period, which is 90 days from the date of filing of the transcript: May 28, 2013, unless extended by court order. However, during this 90−day period the transcript is available for viewing only during normal business hours at the Clerk's office.

Any questions regarding the transcript process should be directed to Matt Parker, Director of Courtroom Services, at (314) 244−4801.

FOR THE COURT:

/s/Dana C. McWay
Clerk of Court

Dated: 2/27/13

**Copies Mailed To:**
Brian C. Walsh, Bryan Cave LLP, 211 N. Broadway, Suite 3600, St. Louis, MO 63102
Rev. 12/10